# Kwale International Sugar Company Limited v Kenya Bureau of Standards & 5 others (Petition 226 of 2018) [2024] KEHC 12124 (KLR) (Constitutional and Human Rights) (2 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12124 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION 226 OF 2018**

**OA SEWE, J**

**OCTOBER 2, 2024**

**IN THE MATTER: ARTICLES 2(1) & (2), 3(1), 10, 19, 20, 22, 23(1) & (3), 27(1), 35, 40, 46, 47(1) & (2), 48, 50(1), 159 AND 258(1) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER: THE STANDARDS ACT 496 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER: THE KENYA REVENUE AUTHORITY ACT NO. 2 OF 1995 LAWS OF KENYA**

**AND**

**IN THE MATTER: SECTIONS 3, 4(1) (2), (3) (A) (B) (D) & (G), (4), 6, 7(1) (A) & (2) OF THE FAIR**

**ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS**

**UNDER ARTICLES 2, 3(1), 10, 19, 20, 21, 22, 23(1) & (3), 27(1), 35, 40, 46, 47, 48 AND 50(1) OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**KWALE INTERNATIONAL SUGAR COMPANY LIMITED ........... PETITIONER**

**AND**

**KENYA BUREAU OF STANDARDS ........................................... 1ST RESPONDENT**

**KENYA REVENUE AUTHORITY ............................................. 2ND RESPONDENT**

**THE HON ATTORNEY GENERAL ........................................... 3RD RESPONDENT**

**MINISTRY OF TRADE ................................................................. 4TH RESPONDENT**

**DIRECTORATE OF CRIMINAL INVESTIGATIONS ............ 5TH RESPONDENT**

**INSPECTOR GENERAL .............................................................. 6TH RESPONDENT**

**RULING**

1. Before the Court for determination is the petitioner's Notice of Motion dated 10th June 2024. It was brought under Rules 3, 18, 19 and 30 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (otherwise known as "the Mutunga Rules") for orders that:

   (a) The time granted vide the order made on 22nd August 2023 for filing an amendment to the Petition dated 18th September 2018, be extended for a further 7 days from the date of the order.

   (b) Consequent to the granting of prayer PARA a. above, the order made on 26th October 2023 for the hearing of the Petition on the basis of the pleadings then on record, be set aside or varied accordingly.

   (b) The costs of the application be in the cause.

2. The application was premised on the grounds that leave was granted to the petitioner vide an order made on 22nd August 2023 to amend the Petition within fourteen (14) days from the date of that order; but that the Amended Petition was not filed until 24th January 2024. The petitioner further averred that on an application by the 1st respondent, the Amended Petition was struck out vide a ruling delivered on 23rd May 2024 for having been filed without leave.

3. The petitioner deposed that it is still desirous of amending its Petition to bring forth the entire case and avoid litigating in piecemeal. It explained that it was unable to comply with the timelines imposed by the Court in its ruling of 22nd August 2023 because:

   (a) The petitioner instructed the firm of Muriu Mungai & Company Advocates LLP to assist in the matter, which firm took some time to fully acquaint itself with the matter.

   (b) Upon familiarization with the matter, it took the firm more time to obtain documentary and affidavit evidence to support the proposed amendments.

   (c) The Advocate handling the matter had several assignments which also required his attention and was therefore unable to get to this matter in time.

4. The grounds aforementioned were expounded on in the Supporting Affidavit sworn by Benson Nzuka Musili on 10th June 2024. In addition to the foregoing, the petitioner deposed that it sought and obtained leave to amend the Plaint in Kwale High Court Civil Case No. 4 of 2023 to plead additional facts sought to be pleaded in the Amended Petition. It was also averred that that an order for consolidation of the two suits was made in that other suit vide a ruling dated 22nd May 2023; and therefore that there would be no prejudice in granting the orders sought herein.

5. The 1st respondent opposed the application vide the Grounds of Opposition dated 24th June 2024 and the Replying Affidavit sworn by Charles Musee on 24th June 2024. According to the 1st respondent no

sufficient explanation was given for the long delay. It posited that rather than seek extension of leave, the petitioner ought to have sought leave afresh after the time granted had lapsed.

6. The 2nd respondent also opposed the application and relied on the Replying Affidavit sworn by Carol Mburugu. The 2nd respondent's basic contention was that the proposed Amended Petition seeks to introduce a new cause of action as well as issues which, ordinarily, would be introduced through a separate suit, such as the loss of business. The 2nd respondent averred that the amendment is aimed at defeating their defence of limitation, without explaining the delay of over five years.

7. The 2nd respondent further deposed that the proposed Amended Petition is incurably defective, misconceived and hinged at defeating the well-laid principles of law and procedure as to the amendment and setting down suits for hearing. The Court was reminded that pleadings closed a long time ago and that the Court of Appeal only directed that the matter be reheard, but did not reopen the pleadings. The 2nd respondent also averred that, since the issues being raised through the proposed Amended Petition occurred more than 6 years ago, its officers who are well versed with them have since left its services and cannot be traced; and therefore that it would be difficult for them to respond and raise a formidable defence after such a long time lapse.

8. In its written submissions dated 15th July 2024, the 2nd respondent proposed the following three issues for determination:

   (a) Whether the proposed amendment which introduces a new cause of action can be allowed.

   (b) Whether the amendments that seem to take away the legal right of the 2nd respondent can be allowed.

   (c) Whether the proposed amendments prejudice the 2nd respondent and brought inordinately late.

9. It is manifest therefore that the submissions of the 2nd respondent appear to be largely off-mark. The key issue is whether the petitioner has shown sufficient cause for extension of time.

10. Extension of time is a matter of discretion as was pointed out in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others PARA 2014. eKLR, in which the Supreme Court held:

> …This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:
>
> 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
>
> 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
>
> 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
>
> 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
>
> 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;

6. Whether the application has been brought without undue delay; and

7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time…"

11. The brief background to the application is that the Court allowed the petitioner's application for leave to amend its Petition on terms that the proposed amendment be effected within 14 days from 22nd August 2023. The 14 days lapsed on 7th September 2023. The petitioner thereafter purported to file an Amended Petition on 24th January 2024 without leave of the Court after directions had been given for the matter to proceed on the basis of the original Petition. At the instance of the 1st respondent vide the Notice of Motion dated 9th February 2024, the petitioner's Amended Petition dated 24th January 2024 was struck out for having been filed out of time and without the Court's sanction.

12. On whether there was inordinate delay, it is not in dispute that the petitioner was granted a window of 14 days to amend its Petition; or that no action was taken during that period. It was not until 24th January 2024, about 5 months later, that the petitioner purported to file its Amended Petition. There can be no disputing that, in the circumstances, the delay was inordinate. In Utalii Transport Company Limited & 3 others v NIC Bank Limited & another PARA 2014. eKLR, it was held:

> Whereas there is no precise measure of what amounts to inordinate delay, and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable."

13. Similarly, in Jaber Mohsen Ali & another v Priscillah Boit& another E & L NO. 200 OF 2012 PARA 2014. eKLR where it was stated:

> …What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter…"

14. I have likewise, paid attention to the reasons given for the delay, namely, that counsel was too busy to get round to filing the Amended Petition in time, and find it implausible. Moreover, the petitioner itself pointed out that it sought and obtained the same orders in Kwale High Court Civil Suit No. 4 of 2023; a suit between the same parties in respect of the same subject matter. The petitioner also mentioned that an order for consolidation of the two suits has already been obtained by it in that other suit.

15. What that means is that the issue is res judicata from the perspective of Section 7 of the *Civil Procedure Act*. The provision states:

> "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

16. The doctrine not only applies to suits but also to applications of a similar nature, whether in the same suit or not. Thus, in Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others, Civil Appeal No. 36 of 1996, the Court of Appeal held:

> "There is not one case cited to show that an application in a suit once decided by courts of competent jurisdiction can be filed once again for rehearing. This shows only one intention on the part of the legislature in India and our *Civil Procedure Act*. That is to say, there must be an end to applications of a similar nature; that is to say further, wider principles of *res judicata* apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation..."

17. In the circumstances, I find no merit in the application dated 10th June 2024. The same is hereby dismissed with costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 2ND DAY OF OCTOBER, 2024**

**OLGA SEWE**

**JUDGE**